U.S. Department of Labor

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DATE ISSUED: July 12, 2000

CASE NO.: 1999-LHC-2717

OWCP NO.: 8-115300

IN THE MATTER OF

RICHARD W. DEGROAT
Claimant

v.

TESORO PETROLEUM DISTRICT,
Employer

and

PACIFIC EMPLOYERS INSURANCE CO.,
Carrier

APPEARANCES:
Phil Watkins, Esq.,
For Claimant

Dennis J. Sullivan, Esq.,
For Employer

BEFORE: C. Richard Avery
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Richard Degroat (Claimant) against Tesoro Petroleum District (Employer) and Pacific Employers

Insurance (Carrier). The formal hearing was conducted at Corpus Christi, Texas on April 11, 2000. Each party was represented by counsel, presented documentary evidence, examined and cross-examined the witnesses, and made oral arguments. The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-15, and Employer's Exhibits 1-9, 17-27, and 31-56.[1] This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Jurisdiction under the LHWCA is proper as Claimant was employed as a Utility I/Roustabout at Tesoro's Marine Services Terminal located on the Intercoastal Waterway at Pt. O'Conner, Texas;
2. That an alleged injury or accident occurred on August 27, 1998, when Claimant alleges he was injured while moving a vessel's gangplank;
3. An employer-employee relationship existed at the time of the alleged accident;
4. Employer was timely advised of the alleged injury on August 27, 1998;
5. A Notice of Controversion was filed on October 6, 1998;
6. An Informal Conference was held on July 27, 1999;
7. Claimant received some disability benefits and medical benefits; and
8. Claimant reached maximum medical improvement on February 28, 2000.

Unresolved Issues

The unresolved issues in this case are:

1. Causation of Claimant's injury, specifically whether it arose within the course and scope of Claimant's employment;
2. Claimant's average weekly wage at the time of the injury;

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[1] Employer submitted extensive exhibits, but only those relevant to the specific issues in contention will be addressed in this opinion.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Joint Exhibit - "JX __, pg. __"; Employer's Exhibit - "EX __, pg. ___"; and Claimant's Exhibit - "CX __, pg. ___".

3. Nature and extent of Claimant's disability;
4. Whether Employer is liable for Section 14(e) penalties; and
5. Whether Employer is entitled to 8(f) relief.

Statement of the Evidence
Testimonial Evidence

Claimant's Testimony

Claimant testified that after graduating from high school in 1978, he joined the Army and was honorably discharged after five years of service. Claimant stated he then obtained employment working a glue press at Francher's Furniture Factory before beginning employment in 1985 with the New York Department of Transportation (NYDOT) where he was employed for 11 years. Claimant explained that his position with the NYDOT was seasonal and that in winter months he worked as laborer running the snow plows, and in the summer months generally worked on the sign crew. Claimant testified that his NYDOT duties were heavy duty year round, but that after his 1995 injury, he was assigned to the lighter duties of a dispatcher. Following his employment with the NYDOT, Claimant was hired as a heating plant helper for Alfred State College, where he worked for just over a year. (EX 49).

Claimant testified he left his position at Alfred State College to earn higher wages at Tesoro, where he worked until his back injury on August 27, 1998. Claimant explained that his position with Employer as a roustabout/laborer required heavy employment duties ranging from forklift operator to rigger. Claimant explained that while he was scheduled for a five day work week, he was always on call and generally worked six or seven days a week for 12 to 15 hours a day. Additionally, Claimant testified he was provided with a flex plan through his employment at Tesoro which he used to purchase health insurance for his family. (EX 49).

According to Claimant, on August 27, 1998, he was at work and was aiding another Tesoro employee in lifting a gangplank and attempting to place it on a boat when he felt a twitch in his back. Claimant testified he completed the work day, but by the next morning was unable to get out of bed and telephoned Employer to inform them he was unable to return to work. Claimant stated he has not returned to any type of employment since his injury that day. (EX 19, 49)

In January, 2000, Claimant stated he enrolled in Del Mar College through an OWCP program where he is studying to become an electronics technician. At the time of the hearing Claimant was enrolled in five courses for a total of 12 hours. Claimant stated that he spends 25 to 26 hours in class weekly, where his courses are scheduled from Monday to Thursday. Additionally, Claimant testified that he spends three to four hours a day in the computer lab, and four to five hours a day from Friday to Sunday studying and completing homework assignments. Claimant testified that due to the rigorous nature of his course work he is unable to perform any type of employment without his grades suffering. Claimant stated he expects to graduate from the program and secure a position as an electronics technician. (EX 49).

Claimant acknowledged suffering several prior back injuries over the years and specifically recalled an incident in 1993 when he was assisting other employees in attempting to remove a snowplow wing off of a truck. Claimant described the snowplow wing as weighing about 1000 pounds and explained that while he was attempting to pull the wing, he strained his back and was out of work for a few days. Additionally, Claimant recalled a non-work related incident which occurred in 1995 in which he slipped on a stair landing. The resulting injury to his back removed him from work for just over a month. (EX 49).

Charlie Doerr, Risk Manager for Tesoro Petroleum

Mr. Charlie Doerr testified that his duties as Employer's risk manager render him responsible for the property and casualty insurance for the company, including claims, losses, and contracts. Mr. Doerr testified that one of the benefits provided by Tesoro was the Flexible Benefit Plan offered to employees which subsidize the employees' health insurance costs. Mr. Doerr explained that the company contributes a set amount of money for an employee's health insurance costs depending upon the extent of coverage requested, i.e. for "employee only" Tesoro contributes $68.76 for pay period; for "employee plus one" Tesoro contributes $134.76 per pay period; and for "employee plus family" Tesoro contributes $200.30 per pay period. Mr. Doerr stated that an employee is required to choose one of the coverage options if they are unable to provide proof of health insurance from another source.[3] (CX 9; EX 26).

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[3] The testimony additionally established that the only way an employee received any flex dollars in addition to wages was if an employee did not require health insurance with Employer

According to Mr. Doerr, the "flex dollars" noted on Claimant's earnings statements represent the amount of money Employer is contributing towards the health insurance costs. In proof of that explanation, Mr. Doerr explained that the amount of money listed in the flex column never changed, even though Claimant's hours fluctuated during his 204 days of employment with Employer. Because Claimant selected the coverage option of "employee plus family", the Employer contributed the amount listed under the flex column on Claimant's earnings statement, or $200.30, towards the costs of Claimant's family health insurance coverage. Because the actual cost of Claimant's family health insurance was approximately $11.00 more than Employer's contribution, the remaining $11.00 was deducted from Claimant's paychecks. Mr. Doerr testified that neither the $200.30 contribution made by Employer or the $11.00 deducted from Claimant's paychecks were included in Claimant's taxable income.[4] (CX 9; EX 26).

Mr. Doerr additionally testified that Employer offers short term disability as an additional benefit, with benefits paying a maximum of 26 weeks of earnings. Mr. Doerr explained that if an employee begins receiving workers' compensation, the short term disability benefits will terminate if Claimant's compensation benefits equal or exceed his regular pay. If not, Employer continues to pay the difference between the compensation benefits and the regular pay in short term disability payments. Thus, Mr. Doerr stated, Claimant received short term disability benefits for only two pay periods because his workers' compensation benefits began and the benefits were greater than his straight time pay.[5] (CX 9; EX 26).

Mr. William L. Quintanilla, Vocational Rehabilitation Counselor

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because they had existing coverage from another source. In that instance, if the employee had proof of other coverage, the employee would receive $15.00 a pay period out of the flex account in addition to his regular hourly wages.

[4] Mr. Doerr explained that the reason the $200.30 in flex dollars, which he testified was actually paid by Employer, was listed on Claimant's W-2 form, was because the IRS required the amount to be listed this way in order for Claimant's $11.00 contribution to be paid with pre-tax dollars.

[5] Straight time pay, Mr. Doerr stated, is computed based upon a 40 hour work week without including overtime.

Mr. William Quintanilla, vocational counselor, testified at the hearing and issued a labor market survey on March 22, 2000, after meeting with Claimant and examining medical records. According to Mr. Quintanilla, at the time of his report, Claimant was released by his treating physician to return to light duty employment with restrictions of no lifting greater than 20 pounds and no bending or stooping. Mr. Quintanilla was aware that Claimant was in school at the time of the hearing, but testified that if Claimant had not chosen to return to school he could have obtained employment as a dispatcher, car rental clerk, telephone operator, assembly worker, or front desk clerk. (EX 47, 55).

As of March 22, 2000, Mr. Quintanilla testified there were jobs available meeting Claimant's medical restrictions and qualifications, including several dispatcher positions; a car rental clerk; a telephone operator; a teleservices representative; a lab tech; an assembly worker; several night clerk and front desk clerk positions; and a night auditor, with wages ranging from $5.15 to $7.00 an hour. Additionally, Mr. Quintanilla identified several part-time positions which would allow Claimant to work around his school schedule, including a flagger (directing traffic); security officers, and positions in telemarketing sales, with wages from $5.50 to $8.00 an hour. After reviewing Claimant's work and study schedule, Mr. Quintanilla opined Claimant could probably find some time to contribute to outside employment, but testified that Claimant's schoolwork should come first, leaving Claimant available for, at most, only part-time employment.(EX 47, 55).

Mr. Quintanilla testified that if Claimant completes his curriculum, which is scheduled to end in December of 2001, he would probably obtain an entry level position earning $8.00 to $10.00 an hour. If Claimant graduates in the top of his class, more specialized positions paying $15.00 to $19.00 an hour might be available to him. Mr. Quintanilla stated that electronic repair persons are always in demand, and that Claimant should not have difficulty securing employment after graduating. Mr. Quintanilla additionally testified that Claimant's future wage earning capacity was much greater than his wage earning capacity at the time of the hearing. (EX 47, 55).

Leon I. Gilner, M.D.

Dr. Leon Gilner, neurosurgeon, testified by deposition on March 23, 2000, and his records were included in evidence. According to Dr. Gilner, he evaluated Claimant on October 15, 1998, upon a referral from Gary Cook, P.A., with Claimant

continuing to complain of low back pain which originated in August, 1998 while pulling a ramp at work. Following examination and review of medical records, Dr. Gilner's impression was that Claimant suffered from degenerative disc disease, herniated discs at the L5-6 and L6-S1 level, and lumbar sprain. Dr. Gilner recommended Claimant begin physical therapy and anti-inflammatories, and noted that if conservative care failed, surgery could prove necessary at some future time. (EX 35, 50).

Alejandro Echeverry, M.D.

Dr. Alejandro Echeverry, neurosurgeon, testified by deposition on March 24, 2000, and his medical records were introduced into evidence. Dr. Echeverry testified that he initially examined Claimant on December 7, 1998, and after examination he opined Claimant should attempt a physical therapy program before surgery was considered an option. When Claimant returned to Dr. Echeverry on January 27, 1999, reporting no improvement in his pain following two months of physical therapy, Dr. Echeverry scheduled Claimant for a myelogram and post myelogram CT. The test results, which indicated a large herniated disc between L5-L6, were reported to Claimant when he returned to Dr. Echeverry on April 7, 1999, and Claimant requested to undergo surgery as soon as possible as he had experienced no relief from his pain. (EX 36, 37, 51).

Claimant underwent a bilateral L5-6 decompressive partial laminectomy performed by Dr. Echeverry on May 18, 1999, and returned for follow up appointments monthly. Claimant noted improvement following the surgery and was progressing as expected. A report dated July 21, 1999, notes that Claimant had been, and continued to be, unable to work at that time. When Claimant returned to Dr. Echeverry on September 29, 1999, Claimant was noted to have gained weight, and a repeat MRI scan of the lumbar spine was ordered due to Claimant's complaints of radicular pain into his right leg The MRI results, which indicated scar tissue formation in the area of the surgery, were included in Dr. Echeverry's November 17, 1999, report in which he indicated that Claimant was unable to return to his previous employment as the position required climbing, lifting, bending, rolling, and stooping; activities which Claimant was noted to be unable to perform. (EX 36, 38, 39, 51).

In January, 2000, Dr. Echeverry referred Claimant to a vocational rehabilitation training program, and on February 28, 2000, he examined Claimant for

the final time of record. Claimant reported that he was doing well and was requested to return in about six weeks, as needed. Dr. Echeverry continued to opine Claimant was unable to return to heavy duty employment positions, but was able to perform light duty requiring lifting of no more than 20 pounds and no bending. According to Dr. Echeverry, Claimant probably reached maximum medical improvement as of his February 28, 2000 visit, but Claimant had been referred to an independent physician for an MMI determination which had not yet been accomplished.(EX 51).

Regarding Claimant's prior back problems, Dr. Echeverry opined, based upon the medical records, that Claimant probably suffered an aggravation of his preexisting condition of a herniated disc when he was attempting to move the ramp on August 28, 1998. (EX 51).

J. Martin Barrash, M.D.,

Dr. Martin Barrash, board certified neurosurgeon, testified by deposition on April 3, 2000. According to his testimony and medical records he issued a report on March 9, 2000, after reviewing medical records, at which time he noted that Claimant's disability appeared to be multi-faceted.[6] Dr. Barrash opined that Claimant's 1993 injury left his back in a weakened state, and that the subsequent lifting injury of 1998, coalesced with the earlier injury to necessitate the surgery Claimant underwent. Dr. Barrash noted that Claimant suffered a 7% permanent partial impairment following his 1993 disc herniation, and that following his 1998 injury Claimant's impairment rose to 12%. Dr. Barrash additionally stated that had Claimant not experienced the 1993 injury, his impairment rating following the 1998 injury would have been 10%. (CX 7; EX 46, 53).

Dr. Barrash concurred with Dr. Kareh's recommendation that Claimant should undergo an epidural steroid injection, and that if the injection proved successful, Dr. Barrash opined Claimant should be restricted from lifting over 30 pounds frequently and 50 pounds infrequently, and should not perform work in a bent or stooped over position for great lengths of time. (CX 7; EX 46, 53).

Medical Evidence Regarding 1998 Injury

Memorial Medical Center

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[6] Dr. Barrash did not physically examine Claimant, but only reviewed medical records before issuing his report.

Records from Memorial Medical Center indicate Claimant received treatment in the emergency room on September 1, 1998, when he presented with a chief complaint of back pain. Diagnosis was of acute spasm in the lumbar area and medications were prescribed. Claimant returned on September 10, 1998, to undergo a lumbar spine MRI which revealed a large disc herniation at L4-5, and a moderate sized disc herniation at L5-S1. (EX 33).

Coastal Medical Clinic

Claimant reported to Dr. Gary Cook on September 4, 1998, when his back pain failed to resolve. Dr. Cook scheduled an MRI and removed Claimant from work until further notice. The records from Coastal Medical Clinic indicate Claimant contacted them in mid-October and requested a referral to a family physician and neurologist in Rockport, his new town of residence. (EX 34).

Victor Kareh, M.D.

Dr. Victor Kareh originally examined Claimant on April 15, 1999, for a second opinion regarding surgery. At that time, Dr. Kareh agreed with Dr. Echeverry that surgery was indicated. He next examined Claimant on February 7, 2000, for a follow-up, after which, Dr. Kareh recommended Claimant receive steroid injections in an attempt to alleviate some of his continuing pain caused by the scar tissue formation in the area of his surgery. (EX 40).[7]

Medical Evidence Regarding Previous Injuries

On September 23, and October 22, 1993, Claimant reported to Dr. Wong Lee reporting back pain with radiating pain into his right thigh and leg. Dr. Lee referred Claimant to Dr. Satish Mongia, neurologist, who initially evaluated Claimant on November 3, 1993. Dr. Mongia ordered MRI and EMG testing and recommended Claimant avoid any strenuous activity. In a report dated November, 30, 1993, Dr. Mongia noted that the MRI indicated that Claimant suffered from a herniated disc at L4-5, and referred Claimant to Dr. Grand. Records indicate Claimant returned to Dr. Lee on November, 2, 1994, reporting back pain on and off in the previous week and a referral was again made to Dr. Mongia. (EX 41, 42).

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[7] While Dr. Kareh's deposition was identified as Exhibit 52, the deposition was not contained in Employer's Exhibits.

Subsequently, on February 15, 1995, Claimant again returned to Dr. Lee reporting an accident in which he slipped and fell down six stairs resulting in severe back pain with difficulty standing or walking. Claimant was referred to Dr. S.C. Bodani, neurologist, who evaluated Claimant on March 3, 1995, and opined Claimant suffered from probable L5 and possible L6 radiculopathy and moderately severe myofascial sprain of his lumbar and cervical spine. Claimant was instructed to avoid heavy lifting and x-rays were scheduled. Claimant returned to Dr. Bodani on April 26, 1995, requesting a release to allow him to return to his previous employment. (EX 41-43).

Other Evidence

Claimant's 1998 W-2 form, as well as Claimant's wage records and earnings statement, indicate Claimant earned $25,825.32 in gross pay, of which $3,842.46 was earned in miscellaneous non-taxable compensation during his 204 days of employment with Employer in 1998. (CX 8, 10, 11, 14, 15; EX 20 - 22, 24).

Findings of Fact and Conclusions of Law

Causation

The parties appear to be in disagreement as to whether or not Claimant's injury resulted from work related activities. While Claimant alleges he sustained a work-related injury on August 27, 1998, when he was attempting to lift a ramp, Employer argues that medical evidence exists which indicates Claimant's 1998 symptomatology was simply a flare up of his 1993 disc herniation. Based upon the evidence presented, I find Claimant has met his Section 20(a) presumption that his injury was work-related and that Employer has failed to rebut the presumption with substantial countervailing evidence.

Section 20(a) of the Act provides Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935). The crucial question is whether the employee's condition is due to the aggravation, acceleration or exacerbation of a pre-existing condition, in which case a new injury

has been sustained, or whether the condition is the natural and unavoidable consequence of a previous work-related injury. See Miller v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991).

While the medical evidence of record certainly indicates that Claimant's prior back injuries played a role in his 1998 condition, the testimony of both Drs. Echeverry and Barrash clearly establish that Claimant's 1998 work-related injury was an aggravation of Claimant's prior condition and not a natural consequence of his previous injuries. In his testimony, Dr. Echeverry opined that when Claimant attempted to move the ramp in August, 1998, it aggravated his pre-existing herniated disc. Likewise, Dr. Barrash referred to Claimant's 1998 injury as a "new injury" which coalesced with Claimant's earlier injury to necessitate Claimant's surgery. Because these are the only physicians of record to offer an opinion specifically as to the causation of Claimant's 1998 condition, I find their opinions persuasive. Thus, I find Claimant's condition in August, 1998, was not simply a natural consequence of his earlier injuries, but instead was the result of an accident which aggravated his pre-existing degenerative condition, and therefore, was a new injury under the Act.

Average Weekly Wage

The first, and primary dispute regarding average weekly wage is whether or not money provided to Claimant in the form of a flex plan should be included as "wages" according to the Act. Under the Act's definition, a "wage" is a money rate received as compensation from an employer for services rendered by the employee. This definition includes the reasonable value of any advantage received if: (1) the advantage either flows directly or indirectly from the employer to the employee; (2) the advantage is easily ascertainable or readily calculable; (3) taxes are withheld; and (4) the advantage is not considered a fringe benefit.

In this instance, the evidence reflects that the benefits provided through Employer's flex plan, in which Claimant participated, were fringe benefits under the Act as they covered costs of health and life insurance. See Morrison-Knudsen Const. Co. v. Director, OWCP, 461 U.S. 624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983); and 33 U.S.C. § 902(13). According to the testimony of Employer's risk manager, Mr. Charles Doerr, the flex plan acted to subsidize health and life insurance costs for employees. As described in Mr. Doerr's testimony, Employer provided a set dollar amount of health and life insurance benefits per two-week pay period which would generally cover the entirety of health and life insurance costs of a single employee. However, if an employee chose to add family coverage to his health insurance, as Claimant elected to do in this instance, Employer's subsidy of

$200.30 would fail to cover all the expenses. Instead, as in Claimant's case, the cost of family insurance coverage totaled $211.30 per two-week pay period. Therefore, Claimant was charged an additional $11.00 per two-week pay period ($211.30 - $200.30) to cover the additional expenses.

Mr. Doer specifically denied the inference that the money placed into the flex plan could be provided specifically to an employee if the employee so desired. Instead, all the testimony and record evidence establishes that the money was to be used for subsidizing health and life insurance plans, whether provided by the Employer or obtained elsewhere.[8] Based upon this evidence it is clear that Employer was providing Claimant a non-taxed, fringe benefit of health and life insurance through the offering of the flex plan, and as such, I find that this amount should not be included in the calculation of Claimant's average weekly wage. Consequently, based upon the wage records provided, I find Claimant earned $20,467.86[9] in wages in the period preceding his injury.

Having determined the portion of Claimant's earnings which constitute "wages", I must now resolve the issue of the appropriate computation of Claimant's average weekly wage. Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910(a)-(c). While both parties are in agreement that Section 10(a) applies in this instance, the parties are in disagreement as to whether Claimant was a five or six day a week worker. Based upon the evidence presented, I find Claimant was a five day a week worker.

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[8] The testimony additionally established that, had Claimant offered proof of other insurance coverage allowing him to opt out of Employer's health plan, he would have been provided with, approximately, an additional $15.00 a pay period. I find that this testimony only offers further proof that Employer's flex plan was a fringe benefit intended to provide health insurance coverage to its employees. If Employer was not required to include an employee in Employer's health insurance plan because the employee had medical insurance elsewhere, Employer offered the additional money, in Claimant's case $15 a pay period, in an attempt to aid in subsidizing the employee's private health insurance costs.

[9] Although Claimant's wage records indicate that he earned $25,825.32 in the year preceding his injury, the parties agreed at the conclusion of the hearing that all flex, sick, and holiday pay earned post-injury, totaling $2,148.34, should be subtracted from Claimant's wages. Additionally, as I have determined that the flex payments included in the figure above were not wages, but were fringe benefits, I have also deducted the total of the flex payments paid pre-injury, $3,209.12, rendering a final salary of $20,467.86.

Claimant testified he was hired to work five days a week, and while he was on call anytime, and often worked other hours, his regular wages were for forty hour work weeks. Any hours worked in addition to the forty paid overtime wages to Claimant equivalent to time and half of his regular pay. Thus, I find, based upon the testimony and evidence submitted, that the most accurate characterization of Claimant's employment is that he was a five day worker, a fact he more or less conceded himself.

The formula delineated in 10(a) provides that in order to calculate Claimant's average weekly wage, Claimant's actual earnings for the 52 weeks preceding his injury are divided by the number of days Claimant actually worked during that period. In this case, based upon the wage records and the testimonial evidence, I find that Claimant earned $20,467.86[10] in the year preceding his injury and worked 204 days during that period. Claimant's resulting daily wage of $100.33 is then multiplied by 260, since Claimant was a five day worker, and divided by 52 pursuant to Section 10(d) in order to compute Claimant's average weekly wage. Therefore, based upon this calculation, Claimant's average weekly wage at the time of the injury was $501.66.

Nature and Extent

While the parties list the nature and extent of Claimant's disability as an issue, their contention is limited simply to whether or not Claimant should return to work while he is enrolled in his college curriculum, and Claimant's present and future wage earning capacity. The parties have stipulated that Claimant reached maximum medical improvement on February 28, 2000, and while Claimant is dissatisfied with the amount of compensation paid, both parties are satisfied that temporary total disability compensation was owed Claimant until February 28, 2000. Additionally, both parties appear to be in agreement that Claimant has made a prima facie case for total disability as no physician of record has opined Claimant is capable of returning to his previous heavy duty employment.[11] As Claimant has established a prima facie

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[10] See footnote 9, *supra*.

[11] The evidence indicates that Claimant was unable to return to his previous heavy duty employment position following his August, 1998, injury. Dr. Echeverry, Claimant's primary treating physician, opined that since the injury Claimant has been unable to perform heavy duty tasks, but is only capable of light duty employment with restrictions of lifting no more than 20 pounds, and no bending. Dr. Barrash's restrictions allowed Claimant to lift 30 pounds frequently, and 50 pounds infrequently, and prohibited Claimant from working in a bent or

case for total disability, the burden shifts to Employer to provide suitable alternative employment.

The evidence indicates Claimant has not returned to work since his on-the-job injury of August 27, 1998, but, instead, with the assistance of OWCP, has enrolled in a full time college curriculum receiving training to become an electronics technician. Despite this fact, Employer contends that as of February 28, 2000, Claimant's stipulated maximum medical improvement date, Claimant could have returned to, at least, part-time employment while continuing his college curriculum. Claimant, however, contends that to do so would damage his grade point average, and thus, his chances of securing an employment position upon graduation. Employer also contends that I should project Claimant's entitlement to future disability compensation by determining his post-graduation wage earning capacity at this time.

On February 28, 2000, Dr. Echeverry released Claimant to return to light duty employment, and Employer argues it has offered suitable alternative employment by way of a labor market survey performed by Mr. William Quintanilla, vocational rehabilitation consultant. Mr. Quintanilla provided appropriate and available positions in his March 22, 2000, labor market survey which identified full-time openings for positions including: dispatchers; a car rental clerk; a telephone operator; a teleservices representative; a lab technician; an assembly worker; night clerks; and a night auditor; paying wages of $5.15 to $7.00 per hour. Additionally, Mr. Quintanilla identified part-time positions including a flagger; security officers; and telemarketing salesperson; with wages ranging from $5.50 to $8.00 an hour and with flexible hours which, arguably, would allow Claimant to continue his education while working.

However, in light of Abbott, I find Claimant's return to any of the identified positions would not meet the Act's goal of promoting the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force. Louisiana Insurance Guaranty Assoc. v. Abbott, Jr., 40 F.3d 122 (5th Cir. 1994). In this instance, just as in Abbott, Employer has identified a majority of minimum wage positions which are in no way

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stooped over position for great lengths of time. Thus, both physicians of record who have offered functional limitations regarding Claimant's employment abilities have effectively eliminated Claimant's return to his previous heavy duty position as a roustabout/laborer.

comparable to Claimant's pre-injury earnings, particularly when Claimant's pre-injury overtime earnings are included in the calculation. Unlike the positions identified in the labor market survey, however, Claimant's educational goals, if realized, would enable him to resume his place, to the greatest extent possible, as a productive member of the work force, earning equivalent or greater earnings than his pre-injury wages.

As to the part-time positions offered in the labor market survey which Mr. Quintanilla suggests would allow Claimant to perform both his school work and employment, I find his opinion unpersuasive. According to Claimant's testimony he has little free time after spending at least 25 hours in the classroom and at least an equivalent amount of time in the computer lab and studying. Thus, as Claimant testified, to perform a part-time job in addition to his full-time course load would be most difficult, and if attempted, would probably result in a lower grade point average, defeating the potential goal of the education. Moreover, Mr. Quintanilla agreed that Claimant's school work should remain his first priority. Therefore, in light of the testimony of record, I find the goals of the Act would be best served by Claimant continuing to receive total disability compensation so long as he is a full time student completing his education goal.[12] Not only will his degree benefit Claimant, but it will likewise ultimately be of benefit to the Employer as well.

Therefore, based upon the evidence of record, I find that Claimant has been totally disabled since August 28, 1998, the day following his accident, and has continued to be totally disabled after reaching maximum medical improvement on February 28, 2000, as returning Claimant to the work force at this time, in light of his attendance in an OWCP rehabilitation program, would not serve the purposes of the Act.

Section 908(f) Relief

Section 8(f) of the Act provides that an employer may limit its liability for compensation payments for permanent disability if the following elements are present: (1) the claimant has a pre-existing permanent partial disability; (2) the pre-

[12] While Employer requests that I predict Claimant's wage earning capacity upon his completion of the course, I fail to find any authority upon which to do so. Such a computation would involve pure speculation on my part, for I have no idea what the future holds for Claimant. The appropriate course of action is for the Employer, at a later date, to request a modification if Claimant's circumstances change and the parties are unable to resolve the matter amicably between themselves.

existing disability was manifest to the employer; and (3) the disability which exists after the work-related injury is not due solely to the injury, but is a combination of both that injury and the existing permanent partial disability. Director, OWCP v. Cargill, Inc., 709 F.2d 616, 619 (9th Cir. 1983), reh'g granted, Brogden v. Newport News Shipbuilding and Dry Dock Co., 16 BRBS 40, 42 (1983); See also H.R. Rep. NO. 92-1441, 92nd Cong. 2d Sess. 8 (1972).

The purpose of §8(f) is to prevent employer discrimination in the hiring of handicapped workers, and to encourage the retention of handicapped workers. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1949); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836, 839 (9th Cir. 1982). It is also well settled that the provisions of §8(f) are to be construed liberally in favor of the employer. Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192 (5th Cir. 1977); Johnson v. Bender Ship Repair, Inc., 8 BRBS 635 (1978).

A pre-existing permanent partial disability can be (1) a scheduled loss under Section 8(c) of the Act; (2) an economic disability arising out of a physical infirmity; or (3) a serious physical disability which would motivate a cautious employer to dismiss a claimant because of a greatly increased risk of an employment-related accident and compensation liability. C & P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977): Cononetz v. Pacific Fisherman, Inc., 11 BRBS 175 (1979); Johnson v. Brady-Hamilton Stevedoring Co., 11 BRBS 427 (1979). Although the mere fact of a past injury does not establish a disability, the existence of a serious and lasting disability does. Foundation Constructors v. Director, OWCP, 950 F.2d 621 (9th Cir. 1991).

In this instance, Employer argues Claimant's substantial and continuous chronic back injuries dating back to, at the latest, 1993, have coalesced or combined with the most recent injury resulting in Claimant's present condition. Employer's argument rests heavily on Dr. Barrash's deposition, wherein he testified that it was his opinion that Claimant's 1993 injury left his back in a weakened state, and that the subsequent lifting injury of 1998 coalesced with the earlier injury to necessitate Claimant's surgery and resulting impairment. Additionally, Dr. Echeverry, Claimant's primary treating physician, opined that Claimant's 1998 injury was an aggravation of Claimant's pre-existing lumbar condition.

Based on the above evidence, I find that prior to his August 27, 1998, injury, Claimant suffered permanent partial disabilities to his back which would have given a reasonable employer pause prior to hiring Claimant. Claimant's degenerative and

chronic conditions of his lumbar spine created a greatly increased risk of an employment-related accident and compensation liability for Employer.

The second requirement for §8(f) relief is that the pre-existing work-related injury is manifest to the employer. A pre-existing impairment is manifest if the employer knew or could have discovered the impairment prior to the second injury. Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 80-83 (1st Cir. 1992); Lowry v. Williamette Iron and Steel Co., 11 BRBS 372 (1979). The existence or availability of record showing the impairment is sufficient notice to meet the manifest requirement. Director v. Universal Terminal and Stevedoring Corp., 575 F.2d 453 (3d Cir. 1978); Todd v. Todd Shipyards Corp., 16 BRBS 163 (1984). Further, virtually any objective evidence of the pre-existing permanent partial disability, even evidence which does not indicate the permanence or severity of the disability, will satisfy the manifest requirement, since it could alert the employer to the existence of a permanent partial disability. Lowry, 11 BRBS 372; Director, OWCP v. Berkstresser, 921 F.2d 306, 309 (D.C. Cir. 1990).

Numerous records exist regarding the prior back injuries suffered by Claimant prior to his August 27, 1998, on-the-job injury which satisfy the manifestation element under the Act. Records from Drs. Wong Lee, Satish Mongia, and S.C. Bodani document Claimant's 1993 and 1995 back injuries and the resulting treatment. Additionally, employment records from the New York Department of Transportation also describe Claimant's past injuries. Thus, by at least constructive knowledge, I find Claimant's prior injuries were manifest to Employer and that, therefore, the second requirement has been satisfied.

Lastly, an employer may obtain §8(f) relief where the combination of the worker's pre-existing disability or medical condition and his last employment-related injury result in a greater permanent disability than the worker would have incurred from the last injury alone. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1144 (9th Cir. 1991); Director, OWCP v. Newport News and Shipbuilding and Dry Dock Co., 676 F.2d 110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). The key element is whether the work-related injury, when coupled with the prior disability, materially and substantially aggravated and contributed to the employee's permanent disability. Dunkin v. Newport News Shipbuilding and Dry Dock Co., 15 BRBS 182, 183 (1982); See also Hedges v. J.M. Martinac Shipbuilding Corp., 16 BRBS 474 (1984). Under this third requirement for §8(f) results, it must be determined if a claimant's present disability results from a coalescence or combination of the most recent work-related injury and

the prior permanent impairment of record. Duncanson-Harrelson & Co. v. Director, OWCP, 13 BRBS 308 (1981); Furney v. Ingalls Shipbuilding Division, Litton Industries, Inc., 17 BRBS 99 (1984).

Employer again relies on Dr. Barrash's deposition testimony and medical records wherein he described Claimant's current disability, which renders him unable to perform heavy labor, as a coalescence of Claimant's 1993, 1995, and 1998 back injuries. Dr. Barrash opined Claimant suffered a 7% permanent partial impairment following his 1993 disc herniation, and that following his 1998 injury, his impairment rating rose to 12%. Furthermore, Dr. Barrash noted that, had Claimant not experienced the 1993 disc herniation, Claimant's impairment rating following the 1998 injury would have been only 10%. As there is no testimony in evidence to dispute his opinion, and because the evidence indicates that the cumulative effects of Claimant's previous back injuries and his pre-existing degenerative condition have taken their toll on Claimant, I accept Dr. Barrash's opinion and find that the Claimant's present condition is a result of the combination of Claimant's pre-existing injuries, and not simply his latest injury alone. Thus, having met each of the requirements, Employer is afforded 908(f) relief.

Section 14(e) Penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of workers' compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer has stipulated that a notice of controversion was not filed until October 6, 1998, and Employer failed to provide compensation until after the informal conference held in July, 1999. Clearly, then, both the notice of controversion and payment of compensation benefits occurred more than 14 days after Employer's August 28, 1998, notification of the accident. Therefore, Claimant is owed 14(e) penalties, the exact amount to be calculated by the District Director.

CONCLUSION

Based upon the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following order:

Conclusion

Based upon the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following order:

Order

It is hereby **ORDERED** that:

1. Employer shall pay to Claimant compensation for his temporary total disability, from August 28, 1998, to February 28, 2000, based upon the average weekly wage of $501.66;

2. Employer shall pay to Claimant compensation for his permanent total disability, from February 29, 2000, and continuing, based upon the average weekly wage of $501.66; provided, however that after 104 weeks the Special Fund shall become liable as provided by §8(f) of the Act;

3. Employer shall receive a credit for all compensation previously paid to Claimant under the Act;

4. Pursuant to Section 7 of the Act, Employer shall be responsible for all medical expenses related to treatment of Claimant's August, 1998, on-the-job injury;

5. Pursuant to Section 14(e) of the Act, Employer shall be assessed penalties on all compensation not timely paid, the exact amount to be calculated by the District Director as heretofore set out;

6. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984);

7. Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. See, 20 C.F.R. §702.132; and;

8. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 12th day of July, 2000, at Metairie, Louisiana.

C. RICHARD AVERY
Administrative Law Judge

CRA:ac